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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 6

JOSEPH CARROLL, RICHARD NORTON, J. B. STONER, CHARLES LYNCH, ROBERT LYONS, WILLIAM BRAILSFORD, AND THE NATIONAL STATES RIGHTS PARTY,

Petitioners,

v.

THE PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE, COUNTY COMMISSIONERS OF SOMERSET COUNTY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1967

No. 689

JOSEPH CARROLL, RICHARD NORTON, J. B. STONER, CHARLES LYNCH, ROBERT LYONS, WILLIAM BRAILSFORD, AND THE NATIONAL STATES RIGHTS PARTY,

Petitioners,

v.

THE PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE, COUNTY COMMISSIONERS OF SOMERSET COUNTY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Maryland appears in full on pages 1a through 12a of the Appendix to the Petition for Writ of Certiorari, and is also reported in 247 Md. 126, 230 A. 2d 452 (1967).

JURISDICTION

The judgment of the Court of Appeals of Maryland, which affirmed a temporary order of August 7, 1966, issued

by the Circuit Court of Somerset County (in equity) restraining Petitioners from holding certain meetings, and which reversed because of its duration an interlocutory order of August 30, 1966, extending the injunction for a period of ten months, was entered on June 7, 1967.

Jurisdiction to review the judgment in question by Writ of Certiorari is conferred under 28 U.S.C. §1257(3) since rights, privileges and immunities are claimed by Petitioners under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Is the issue before this Court moot in any event since the temporary injunction has long since expired?

2. Was the order of the Circuit Court for Somerset County granting a temporary injunction in accord with

applicable decisions of this Court and so did not violate rights assured to Petitioners under the Constitution of the United States?

STATEMENT OF THE CASE

Respondents accept Petitioners' Statement of the Case with the following additions:

At the time Petitioners spoke in Princess Anne, Somerset County, Maryland on August 6, 1966, there was a tense atmosphere concerning local racial conditions (T.[1] 25).

Capt. Paul J. Randall, Troop Commander, Eastern Shore District, Maryland State Police, testified that the probable consequence, had Petitioners been allowed to continue meetings in August, was that there would have been a riot (T. 42). Somerset County had had its share of racial troubles and disorders. In Princess Anne, however, the local community leaders had been working to resolve their problems at the local level. Norris Dashiell, one of the Town Commissioners for Princess Anne and a Respondent herein, in response to a question about conditions at the rally on the night of the 6th, said:

> "That if we didn't get something done to slow it down, knowing what I know about the tension around here between the races — we are all the time giving and taking and talking back and forth, as everybody knows, about the civil rights deal. And I know that it is on a teeter, it could go either way, and anybody else around here knows the same thing.
>
> And I am just as positive as I can be that if this thing had been continued we would have a riot, to be truthful" (T. 64).

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[1] "T." refers to the transcript of the hearing August 17, 1966 on the injunction, which is part of the certified record filed with the Clerk of this Court.

In their speeches Petitioners used vile, offensive, derogatory and threatening language. Most prevalent throughout the speeches was the word "Nigger", and one witness testified that he understood part of a record played at the rally to say "we have got to kill them niggers" (T. 36). During his speech, Petitioner Norton directed part of his remarks to a group of Negroes in the crowd and said "[g]et ready to leave this country. You can leave a lot of ways — you can leave on boat, you can leave running, you can bicycle, or you can leave in a box" (TT.[2] 61). Norton also made reference to a 1933 incident in Somerset County in which a Negro had been lynched for the alleged rape of an elderly white woman. He told the crowd:

> "Thirty days ago I sat in the Enoch Pratt Library in Baltimore, Maryland, going over a microfilm. I got to the 1933. In 1933 a nigger grabbed a 75 year old white woman in this town and brutally raped her, brutally raped her. What did they do? Did the people go out and say that nigger was a victim of discrimination and that's why he raped her? No. Let me tell you what happened. I am not advocating this but I am just recounting a bit of history. Three thousand people from this town rose up, took that beast out and hung him. You know what the Baltimore papers said, you know what they said? They called it eastern shore barbarian, eastern shore barbarian. Not a lot of old-timers here tonight remember the stickers you all had on your cars and windows, I am an eastern shore man and damn proud of it. You folks proud of it?" (TT. 12).

Although at points Petitioners specifically denied they were interested in violence and appeared to appeal to the crowd to avoid violent acts, they called on the people to never accept integration, to "[f]ight it. You'll win every

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[2] "TT." refers to transcript of speeches on August 6, 1966, which is part of the certified record.

single time. You want to fight? Come on, let's hear it. Want to fight?" (TT. 13). In urging the crowd to always have a gun, know how to use it, and always have a good supply of ammunition, they said:

> "you are going to have to use it. It's no use hiding; you can't bury your head in the sand like an ostrich. The problems aren't going to go away. The time is come — you are going to have to stand up and face it. You are going to have to face it" (TT. 28-29).

Petitioner Lynch made it clear that he was ready for a fight:

> "I'm willing now and I'll be willing tomorrow and I'll always be willing to fight. Yes, hell yes, any way it takes to fight to stop this invasion of our white communities. How do you white folks feel about it out there, huh?" (TT. 50-51).

Officer Charles W. Teeny of the Baltimore County Police Bureau, Intelligence Section, testified that "during the last part of the speeches four negro subjects locked arms together and marched through the group of white people and it right evident if there had been a push we would have had trouble" (T. 76).

ARGUMENT

I.

THE ISSUE BEFORE THIS COURT IS MOOT IN ANY EVENT SINCE THE TEMPORARY INJUNCTION HAS LONG SINCE EXPIRED.

It was said in *Brownlow v. Schwartz*, 261 U.S. 216, 217 (1923) that "[t]o adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain." Cited in *Local No. 8-6 v. Missouri*, 361 U.S. 363 (1960).

In *Local No. 8-6 v. Missouri, supra,* the Court was asked to uphold the validity of an injunction which expired by its own terms more than three years before the date of the decision of the Supreme Court. The Court declined to consider the case on its merits and noted that any judgment which it could render "would be wholly ineffectual for want of a subject matter on which it could operate." 361 U.S. 371. The reason for the Court's refusal to consider the case on its merits was stated thusly:

> "An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other." 361 U.S. 371.

Further, as this Court said in *Texas & Pacific Ry. Co. v. Interstate Transportation Co.*, 155 U.S. 585, 589 (1895) "[t]o now entertain the bill would be to deal with a state of affairs no longer existing, and which possibly may never recur."

These same comments are applicable to the present case. The temporary order issued by the Circuit Court for Somerset County (Apx.[3] 1), which is the subject of the Petition, expired with the filing of the interlocutory order on August 30, 1966 (Apx. 3), more than sixteen months ago. The injunction was obviously based upon a particular set of facts and circumstances existing at the time the temporary order was issued. Thus, any action by this Court now would be wholly ineffectual for want of a subject matter, and the exact facts and circumstances existing at the time the temporary order was issued will possibly (probably) never recur.

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[3] "Apx." refers to Appendix to Respondents' Brief.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied on the basis that the issue before this Court is moot.[4]

II.

THE ORDER OF THE CIRCUIT COURT FOR SOMERSET COUNTY GRANTING A TEMPORARY INJUNCTION WAS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT AND SO DID NOT VIOLATE RIGHTS ASSURED TO PETITIONERS UNDER THE CONSTITUTION OF THE UNITED STATES.

Even if this Court determines that the issue before it is not moot, it should decline to grant the Petition for Writ of Certiorari sought herein. Respondents call attention to the fact that this case involves an injunction granted by a court of competent jurisdiction in the State of Maryland. In dealing with injunctions, this Court has recognized the right of a state court to enjoin acts which may cause or lead to violence. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

The cases cited by Petitioners in support of their contention that the temporary injunction was improperly granted because it was a prior restraint of speech in violation of the First Amendment involved either appeals of criminal convictions, or attacks upon an ordinance or statute that imposed some restraint on speech (or the press) prior to *any* judicial consideration of the action, viz, licensing requirements, censorship, etc.

Freedman v. Maryland, 380 U.S. 51 (1965), cited by Petitioners, clearly points up the theory and philosophy behind the distaste which this Court has shown towards prior restraints upon speech in the cases cited by Peti-

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[4] Respondents take exception to the letters which appear on pages 18a through 25a of the Appendix to Petitioners' Brief. These letters are not part of the record of the case tried below and are thus not properly before this Court.

tioners. When this theory and philosophy is reviewed, it is clear that it is not applicable to the present situation. In *Freedman*, the Court stated, at 58, that "[t]he teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman* also made it clear that this Court is concerned not only with the availability of a judicial determination upon a restraint of speech, but also with the speed with which one claimed to be aggrieved by such a restraint may obtain judicial review thereof.[5]

As noted above, the right of a state court to issue an injunction in order to preserve the public peace, even though such injunction may restrain one's unbridled freedom of speech, was recognized by this Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies, supra.*[6] The injunction may even be issued though the restricted action itself is not violent, but is likely to cause violence. "The

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[5] We call the Court's attention to Rule BB72 b. of the Maryland Rules of Procedure, which provides that:

> "An ex parte injunction shall be served forthwith on the adverse party by the quickest possible means; it shall give the adverse party leave to move for a hearing on not more than two days' notice; and it shall expire by its terms within such time after entry as the court may fix. Such time shall not exceed ten days, in case of a resident, and shall not exceed thirty-five days, in case of a nonresident. The court may within the time so fixed, for good cause shown, extend such time for a like period or for a longer period if the party against whom the injunction is directed consents."

[6] Inferior federal courts have also applied use of this injunctive power. See *United States v. U. S. Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897 (1961) and *Cottonreader v. Johnson*, 252 F. Supp. 492 (1966). In *United States v. U. S. Klans, supra*, it was noted that "[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." 194 F. Supp. 905.

question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed." 312 U.S. 292. This Court recognized that it can even look beyond the narrow acts sought to be enjoined and consider them in the light of their surroundings:

> "* * *. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.
>
> * * * * * * *
>
> "* * *. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct." 312 U.S. 293-295.

This Court thereupon affirmed the issuance of the injunction by the Illinois court and, on the issue of the possible transgression of constitutional rights, said "[w]e find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club." 312 U.S. 295.

Respondents submit that the decision and opinion in the *Milk Wagon Drivers Union* case are applicable to the present situation. Respondents had the right to seek, as

they did, a judicial alternative to rioting in the streets. They had the right to seek, as they did, to prevent those classes of speech which have never been thought to raise any constitutional problems, viz., the libelous and the insulting or fighting words. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

The words used by Petitioners in their speeches on August 6th amounted to such "libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire, supra*, at 572. The use of such words gives to a state not only the power to punish those who emit the utterances, but also the power to *prevent* the same. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). In *Chaplinsky*, it was said, at 573, that:

> "* * *. The statute as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker — including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

In the instant case, the language used by Petitioners in their speeches on August 6th was more inflammatory and threatening than that in *Chaplinsky*. In the crowd listening to Petitioners were a group of Negroes. Directing his comments to them, Petitioner Norton said:

> "* * *. I'm going to tell you niggers out there now the best thing you can do is start taking reservations for Africa for you're finished. We don't need you. You're off, you're dead. Get ready to leave this country. Get ready to leave this country. You can leave a lot of ways — you can leave on boat, you can leave running, you can bicycle, or you can leave in a box. This is a

white man's country. Princess Anne is a white man's town. This is a white man's county" (A.[7] 8a).

Throughout Petitioners' speeches their language and references amounted to epithets that could only, as they were intended to do, insult, defame, libel and revile some of those in the crowd, and were likely to incite an immediate breach of the peace.

In his dissenting opinion in *Kunz v. New York*, 340 U.S. 290, 299 (1951), Mr. Justice Frankfurter eloquently classified the type of language used by petitioners:

> "* * *. These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low. They are not in that class of epithets whose literal sting will be drawn if the speaker smiles when he uses them. They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles. Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned."

The Negroes in the crowd listening to Petitioners' harangues would likewise have been "more than tolerant" if they had passed off lightly the thinly veiled threat to them contained in Petitioner Norton's references to a 1933 lynching that had taken place in Somerset County. In obvious contempt of a request by the police not to refer

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[7] "A." refers to Appendix to Petitioners' Brief.

in their speeches to two rape cases then pending in Somerset County, Petitioner Norton mentioned the 1933 incident, which had involved a Negro who was charged with having raped an elderly white woman.[8]

Petitioners' reliance on *Terminiello v. Chicago*, 337 U.S. 1 (1949), *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965) as justification for this Court's granting Certiorari is misplaced. In both *Edwards* and *Cox* the Court specifically found an absence of any "fighting words". In *Terminiello* the Court did not even reach that point, as it found that a preliminary point was dispositive of the case. In regard to Petitioners' attempt to delimit the authority of *Beauharnais v. Illinois*, 343 U.S. 250 (1952) in the present case, it need only be said that Petitioners misquote the language of *Time v. Hill*, 385 U.S. 374, 390 (1967).

Respondents submit that the words used by Petitioners in their speeches on August 6, 1966 amounted to "fighting words"; that this case is clearly under the authority of *Chaplinsky v. New Hampshire, supra*; and that the Temporary Injunction was valid under *Milk Wagon Drivers Union v. Meadowmoor Dairies, supra*. Accordingly, the Temporary Injunction issued by the Circuit Court for Somerset County was in accord with applicable decisions of this Court and did not violate any rights assured to the Petitioners under the Constitution of the United States.

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[8] In his comments, Mr. Justice Frankfurter also said "[o]f course, people might pass this speaker by as a mental case, and so they might file out of a theatre in good order at the cry of 'fire'. But in both cases there is genuine likelihood that someone will get hurt." *Kunz v. New York, supra*, at 299.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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